PAGANELLI SDN BHD

v.

CARE-ME DIRECT SALES SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[COMPANIES WINDING-UP NO: 28-42-1997]
12 MARCH 1999

CIVIL PROCEDURE: *Execution - Stay - Special circumstances - Rendered nugatory test - Whether either test may be applied - Whether allegation of error/misdirection amounts to special circumstances - Prospect of an arguable case on appeal - Whether order striking out winding-up petition should be stayed - Whether taxation of costs to be stayed*

The petitioner presented a petition on 8 November 1997 for the winding-up of the respondent pursuant to s. 218(1)(e) of the Companies Act 1965 ('the Act') on the ground that the respondent was unable to pay its debt amounting to RM25,717. Upon being served the petition, the respondent filed a motion to strike it out. On 19 March 1998, the petition was struck out by the learned judge on the ground that the debt allegedly due to the petitioner was genuinely disputed on substantial grounds. Dissatisfied, the petitioner filed an application for leave to appeal to the Court of Appeal on 17 April 1998. Pending the hearing of its application for leave, the petitioner applied for a stay of the order striking out the petition as well as of the taxation of the respondent's costs.

Held:

[1] It is settled that an applicant must show special circumstances in order for the court to grant a stay of execution. However, the Court of Appeal has advocated a more practical, flexible and less stringent approach with the primary purpose of ensuring that an appeal, if successful, will not be rendered nugatory. Both approaches may be adopted by the court.

[2] Allegations of error on the part of the learned judge, even if well founded, did not entitle the petitioner to a stay as they did not constitute special circumstances. However, adopting the more flexible approach, such allegations could be considered as demonstrating an arguable case on appeal and could be regarded as a factor to be taken into account in deciding whether the appeal, if successful, would be rendered nugatory.

[3] The petition was struck out on an interlocutory application and not after a full hearing. Thus, even if the petitioner is successful in its appeal, this does not result in the respondent being wound-up, but only in the petition being reinstated to be heard. Hence, it was not right to argue that the appeal, if successful, would be rendered nugatory.

[4] The protection afforded to unsecured creditors by ss. 219 and 214 of the Act only becomes available if a winding-up petition has been presented and continues to remain in place. In this case, there was no petition against the respondent and therefore the questions of preferring one creditor over another and dissipation of assets did not come into consideration. Sections 219 and 224 of the Act were not enacted to give the petitioner a better position in recovering its alleged debt and neither should the court allow them to be so used.

[5] If a party becomes entitled to be paid costs when the proceedings have not been concluded yet, that party will not be paid its costs forthwith unless the court so orders. In the absence of any such order, the costs awarded should follow the general rule in interlocutory proceedings and be dealt with at the conclusion of the proceedings.

[Application for stay of order striking out petition dismissed; application for stay of taxation of costs granted.]

Case(s) referred to:

Hai Yue Hin v. Public Feedmill (M) Sdn Bhd [1997] 4 CLJ 555 ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***
Kerajaan Malaysia v. Jasanusu Sdn Bhd [1975] 2 MLJ 105 ***(refd)***
Kredin Sdn Bhd v. Development & Commercial Bank Bhd [1995] 4 CLJ 19 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***
Monk v. Bertram [1891] 1 QB 346 ***(foll)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), 219(2), 223, 224
Courts of Judicature Act 1964, ss. 43(1), 73
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 59 r. 4(1)

For the petitioner - Alex Chang Huey Wah (Lim Swee Kim with him); M/s Alex Chang & Co
For the respondent - David Chai (Serena Wan Yuet Sinn with him); M/s Serena YS Wan & Co

Reported by Farah Naim

JUDGMENT

Clement Skinner JC:

On 8 November 1997, Paganelli Sdn Bhd (hereafter the petitioner) presented a petition, pursuant to s. 218(1)(e) Companies Act 1965, for the Winding-up of Care-Me Direct Sales Sdn Bhd (hereafter the respondent) on the ground that the respondent was unable to pay its debts. By a letter dated 16 September 1997, the petitioner had sent a notice to the respondent demanding payment of a sum of RM25,717 within three weeks from receipt of the said notice. When this demand went unanswered, the petitioner filed this petition.

Upon being served the petition, the respondent filed a motion to strike it out. The court was duly moved on 18 March 1998 and on 19 March 1998 struck out the petition with costs. The learned judge found, *inter alia*, that the debt allegedly due to the petitioner was genuinely disputed on substantial grounds.

Being dissatisfied with the above decision the petitioner on 17 April 1998 filed an application seeking leave to appeal from the Court of Appeal. Pending the hearing of its application the petitioner applies for a stay of the order striking out the petition as well as a stay of the taxation of the respondent's costs.

Section 73 of the Courts of Judicature Act 1964 (the Act) expressly states that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders. Rule 13 of the Rules of the Court of Appeal 1994 mirrors the provisions of s. 73 of the Act and s. 43 of the Act provides that whenever an application may be made either to the High Court or to the Court of Appeal, the application should be first made to the High Court.

The court appealed from is thus vested with a discretion to order a stay but like any other judicial discretion, it is to be exercised in accordance with well settled principles.

Those principles have almost without exception required an applicant to show special circumstances to warrant the grant of a stay (see *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v. Jasanusu Sdn. Bhd.* [1975] 2 MLJ 105, *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119). The Court of Appeal has however in recent times advocated a more practical, flexible and less stringent approach with the primary object of ensuring that an appeal, if successful, will not be rendered nugatory. This is how his Lordship Gopal Sri Ram JCA speaking for the Court in *See Teow Guan & 10 Ors. v. Kian Joo Holdings Sdn. Bhd. & 3 Ors.* [1995] 3 MLJ 598 expressed it at p. 610:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this Court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo.*

Reading the decision of the Federal Court in the cases of Dato' Hj. Ghani Gilong and Jasanusa Sdn. Bhd., and that of the Court of Appeal in *See Teow Guan,* it seems to me that the approach I should take in considering this application is to see if the applicant can either show special circumstance or demonstrate that an appeal if successful would be rendered nugatory to entitle it to a stay.

What are the factors then that the petitioner rely upon as entitling them to a stay.

Mr. Alex Chang, learned Counsel for the petitioner began by saying that the decision of the learned judge shows *ex facie* error in findings of fact. Counsel went to some length to identify several areas where the learned judge allegedly erred. In particular it is said that:

(a) the learned judge was confused between facts going to show that the petition had not been properly served and facts tending to show a dispute of the debt;

(b) the finding by the learned judge that there is fraud or near fraud on the part of the respondent in presenting this petition cannot be supported as the respondent had not raised this complaint in their affidavits or in submissions;

(c) the learned judge failed to take into account the conduct of the respondent which the petitioner alleges was not forthright. An example of this is the refusal of the respondent to confirm, when requested to, whether or not they possessed a valid licence issued by the Ministry of Trade to undertake their direct sales business. The petitioner says such refusal should have attracted an adverse inference being drawn against them pursuant to s. 114 (g) Evidence Act. Another example is the allegedly untruthful denial by the respondent of the debt when earlier on, the respondent had acknowledged that part of the same debt amounting to RM15,519.88 was owing to the petitioner for purposes of the preparation of the petitioner's audited accounts. Yet another example is the respondents' claim that there is no debt due because there has been a contra of the RM25,712.81 through a company called Lienn Fashion Accessories Sdn. Bhd. when no such contra had been agreed to by the parties concerned;

(d) the learned judge had erred in disallowing the petitioner's application to cross-examine the deponents of the affidavits which has resulted in unfairness to the petitioner.

I do not think it would be an unfair summary of the petitioner's position if I said it is their complaint that the learned judge had misdirected himself on the facts, failed to consider relevant matters and his decision cannot be supported on the evidence.

Even if these complaints are well founded, they would not entitle the petitioner to a stay because such matters do not constitute special circumstances. In *Monk v. Bertram* [1891] 1 QB 346, Lord Esher MR said:

> It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the court will grant a stay of execution.

Notwithstanding that the allegations of error do not constitute special circumstances, adopting the more flexible approach I should nevertheless consider them as demonstrating an arguable case on appeal and regard such prospect as one of the factors I should take into account in deciding whether an appeal if successful would be rendered nugatory.

It was next submitted by learned counsel for the petitioner that if a stay was not granted, and the petitioner is successful in their appeal, such success would be rendered nugatory as the assets of the respondent may be dissipated leaving the petitioner with a company that is nothing but a shell to look to, for recovery of its debt. I must say I find this submission to be factually incorrect. The petition was struck out on an interlocutory application and not after a full hearing. If the petitioner is successful in its appeal, this does not result in the respondent being wound-up. All that happens is that the petition is reinstated to be heard and at the end of the day there may or may not be a winding-up ordered. Therefore, to suggest that on the facts of this case, an appeal if successful would be rendered nugatory is a fallacy.

I also find that the petitioner have based their argument that their appeal will be rendered nugatory if successful grounded on their belief or suspicion that the Direct Sales Licence of the respondent had been cancelled by the government in which event the respondent having no other source of income would be forced to dispose of its assets and to close down. However, the petitioner has been aware since about 30 September 1998 that there is no longer any basis for their belief or suspicion as the respondent has filed in this court a copy of their current Direct Sales Licence valid from 1 September

1998 to 31 August 1999. The respondent is a going concern and very much in operation at the moment as clearly stated in the affidavit of Fong Kai Chuan filed on 11 September 1998 in these proceedings. I therefore find no merit in this argument.

The wind having been taken from their sail, the petitioner has had to look to other reasons to sustain their quest for a stay. Although not raised in their application or their affidavit in support of it, learned counsel for the petitioner has sought to pray in aid the protection of s. 219(2) and s. 224 Companies Act 1965. Counsel drew my attention to the fact that after the petition had been presented, the respondent paid out money to one of its creditors identified as Art Studio and which payment is disclosed in encl. 19. Learned counsel submits that in making such payment, the respondent has shown undue preference to Art. Studio over other unsecured creditors such as the petitioner wherefore a stay should be granted so that the assets of the respondent are preserved for *pari-pasu* distribution to all the unsecured creditors as intended by Parliament in enacting s. 219 and 224 Companies Act and which intention is confirmed by the Court of Appeal decision in *Kredin Sdn. Bhd. v. Development & Commercial Bank Bhd* [1995] 4 CLJ 19; [1995] 3 AMR 264.

In my judgment, the preservation of assets argument does not advance the case of the petitioner for a stay because the protection afforded to unsecured creditors by ss. 219 and 224 only becomes available where a winding-up petition has been presented against a company and continues to remain in place.

It is important not to overlook the fact that in the *Kredin* case, the petition to wind-up the company had been presented and was still in place against the company when the respondent bank registered a prohibitory order against five pieces of land belonging to the company to execute a judgment it had obtained. It is thus my view that the following passage in the judgment of Siti Norma Yaakob JCA at p. 2647 mast be viewed in the context of a petition being in position against the company:

> Thus s. 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding-up to the date when the order for winding-up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors.

In the application before me, the position that attains at this time when a stay is sought is that there is no petition against the respondent and therefore the question of preferring one creditor over another does not come into consideration and neither does the question of dissipation of assets. It is evident

to me that what the petitioner seeks to achieve by obtaining a stay is to be able to take advantage of s. 219(2) and s. 224 to preserve the assets of the respondent so that in the event the petitioner is finally successful, it will be in a better position to recover its alleged debt. To me, s. 219 and s. 224 were not enacted to be employed in the manner sought to by the petitioner and neither should a court allow them to be so used.

Quite apart from the above, there are other factors that need to be seriously addressed when considering the petitioners' application for a stay. I cannot ignore the consequences that would follow from the grant of a stay. Its immediate result would be that the winding-up petition remains insitu against the respondent. To me, the presentation of a winding-up petition against a company is a most serious matter bringing with it some very real restrictions on what a company may or may not do. For example, any disposition of its property, transfer of its shares or alteration in status of its members are void unless sanctioned by court (s. 223). Banks will also not generally make payments out of the company's account. There will be a general reluctance for anyone to deal with the company. The respondent is a going concern, will not be immune from the difficulties above described if a stay is ordered leading to the respondent being prevented from effectively going about their normal business unless they apply to court for validation orders under s. 223 Companies Act 1965. The respondent in fact already complain that if a stay is granted, their bank accounts would have to be frozen again. The petitioner on the other hand says that since the respondent can apply for validation orders there should be no impediment to granting a stay.

To me, when the competing interest of the petitioner and respondent are weighed, I have no doubt that the balance lies firmly in favour of the respondent for the reasons already adverted to earlier and that the respondent should not have to suffer a petition of winding-up a day longer than necessary and neither should they have reimposed upon them the uncertainty and hardship which a reinstatement of the winding-up petition will bring.

Having balanced all the factors I have discussed above, I find the justice of this case does not call for the grant of a stay of the order for striking out and refuse it.

With regard to the application for a stay of the taxation of costs awarded to the respondent, the petitioners are on firmer ground here. The respondent have taken steps to have their costs taxed and have persisted with it despite a request from the petitioner that they should await the outcome of the appeal.

The respondent contends that as the order made was a final one, they are entitled to proceed to tax and have their costs paid. I do not agree. Whilst the decision to strike the petition out may be said to decide the rights of the parties with some finality, yet it was obtained upon an interlocutory application.

As the petitioner is now seeking leave to appeal, proceedings between the petitioner and the respondent have not concluded yet.

Order 59 r. 4(1) Rules of the High Court 1980 states:

> Costs may be dealt with by the Court at any stage of the proceedings; and any order of the Court for the payment of costs may, if the Court think fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

It is quite clear from a reading of the above rule that whilst a court may deal with the question of costs at any stage of the proceedings, if a party becomes entitled to be paid costs when the proceedings have not concluded yet, that party would not be entitled to be paid its cost fortwith unless the court so orders.

In the case of *Hai Yue Hin v. Public Feedmill (M) Sdn. Bhd. (Receiver Appointed (In Liquidation)* [1997] 4 AMR 3637, the Court of Appeal had occasion to consider the provisions of O. 59 r. 4(1) in relation to costs awarded in interlocutory proceedings in the form of an O. 14 application. Shaik Daud Md. Ismail JCA speaking for the court said at p. 3641:

> On our reading of Order 59 r. 4(1) we find that the intention of this rule is as clear as day. The rule itself indicates that the question of costs is left to the discretion of the Court and also provides that the Court "may, if the Court thinks fit require the costs to be paid forthwith". Surely these words must mean what they say. If the Court thinks it fit, the Court itself would order the costs to be paid fortwith and in the absence of such an order, it should follow the general rule of interlocutory proceeding, and the costs should only be paid with the conclusion of the proceedings.

The Order of 19 March 1998 in so far as costs are concerned is in the following terms.

> It is also hereby ordered the costs of this application including incidental costs relating to this petition be borne by the petitioner.

There was no request that the above costs be paid forthwith and neither has an order been made by the learned judge that costs be paid fortwith. In the absence of any such order the costs awarded to the respondent should follow the general rule of interlocutory proceedings and be dealt with at the conclusion of proceedings. I accordingly stay all further proceedings on the award of costs to the respondent.

As regards costs of this application I will hear the parties on the appropriate order I should make. The deputy registrar is to fix an appropriate date.